Supreme Court, U.S.
FILED
MAR 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1150

In The

Supreme Court of the United States

OCTOBER TERM, 1987

MARION S. BARRY, JR., *et al.*
Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*
Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

FREDERICK D. COOKE, JR.
Corporation Counsel, D.C.

*CHARLES L. REISCHEL,
Deputy Corporation Counsel, D.C.
Appellate Division

Attorneys for Petitioners
Room 305, District Building
14th & Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 727-6252

**Counsel of Record*

No. 87-1150

In The

Supreme Court of the United States

OCTOBER TERM, 1987

MARION S. BARRY, JR., *et al.*

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*

Respondents.

Supplemental Brief In Support of Petition for Certiorari to the United States Court of Appeals for the District of Columbia Circuit

This supplemental brief is submitted pursuant to Rule 22.6 in order to call the Court's attention to the fact that, on March 4, 1988, the United States Court of Appeals for the District of Columbia Circuit vacated its prior order granting *en banc* consideration of this case by a vote of six to five.[1] The dissenters filed a statement.

The dissenting statement observes that this case involves "one of the fundamental dilemmas this society faces," namely, deciding the circumstances under which an employer may lawfully eliminate a "manifest imbalance" of minorities and females in its work force. See appendix, *infra*, at 2a. The

[1] Another employment case, involving the District's police department, which had been consolidated with this case for rehearing *en banc*, was voluntarily dismissed recently when the parties settled their dispute. The Circuit recited that it was reversing its decision to review this case *en banc* in light of that development. *Infra*, et al.

statement points out that the panel majority decision—which is now the law of the Circuit—ignores the critical importance this Court attaches to voluntary efforts to eliminate the vestiges of past discrimination. The panel's opinion, the dissenters write, is based on the panel's claim that this Court "did not speak plainly enough" in *Johnson v. Transportation Agency*, 107 S. Ct. 1442, 55 U.S.L.W. 4379 (1987). *Id.* *See* Appendix to the Petition for a Writ of Certiorari at 98a (Silberman, J., concurring) ("I am uncertain as to the meaning of 'manifest imbalance,' the imprecise term used by the Supreme Court. . . .").

While the five judges who concur in the dissenting statement believe that "the direction of the Court in *Johnson* and elsewhere is manifestly clear" (appendix, *infra*, at 3a) they also believe that the Circuit Court's inability to come to a common understanding on this question is intolerable: "The question presented in this case is too important to leave in its present unsatisfactory state in this Circuit or elsewhere." *Id.*

The order of the Circuit vacating its earlier order granting *en banc* consideration and the dissenting statement are attached.

Respectfully submitted,
FREDERICK D. COOKE, JR.
Corporation Counsel, D.C.

*CHARLES L. REISCHEL,
Deputy Corporation Counsel, D.C.
Appellate Division

Attorneys for Petitioners
Room 305, District Building
14th & Pennsylvania Ave., N.W.
Washington, D.C. 20004
Telephone: (202) 727-6252

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 85-5669 SEPTEMBER TERM, 1987
CA 84-00903

MARVIN K. HAMMON, *et al.*
UNITED STATES OF AMERICA,
Apellant

v.

MARION BARRY, JR., MAYOR, D.C., *et al.*

AND CONSOLIDATED CASES NOS. 85-5670 AND 85-5671

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

ORDER

Upon consideration of this Court's *en banc* orders of February 26, 1988, and March 4, 1988, in Nos. 86-5377 and 86-5378, *Joseph J. Ledoux* v. *District of Columbia*, granting the joint motion to remand and dismiss, and vacating this Court's opinion, it is

ORDERED, by the Court *en banc*, on its own motion, that the order of November 20, 1987, granting rehearing by the Court *en banc* in *Hammon* be, and the same hereby is, vacated.

Per Curiam
FOR THE COURT:
Constance Dupre, Clerk

By: /s/ Robert F. Bonner
Deputy Clerk

A dissenting statement of Circuit Judge Mikva, joined by Chief Judge Wald and Circuit Judges Robinson, Ruth B. Ginsburg and Edwards, is attached.

DISSENTING STATEMENT ACCOMPANYING ORDER REVOKING PREVIOUS ORDER TO REHEAR *HAMMON V. BARRY* (No. 85-5669) *En Banc.*

Dissenting Statement filed by *Circuit Judge* MIKVA in which *Chief Judge* WALD and *Circuit Judges* ROBINSON, R. B. GINSBURG and EDWARDS join.

MIKVA, *Circuit Judge, dissenting:* This court today revokes its earlier decision to rehear this case *en banc.* The court has already labored for so many pages in the prior two opinions in this case, *see Hammon v. Barry*, 813 F.2d 412, (47 pages), petition for rehearing denied, 826 F.2d 73 (D.C. Cir. 1987) (20 pages), that we are reluctant to further burden bench and bar criticizing the ill-suited directions taken by the panel majority.

However, this case concerns one of the fundamental dilemmas our society faces: how to eliminate a " 'manifest imbalance' that reflected underrepresentation" of women and minorities in the work force. *Johnson v. Transportation Agency, Santa Clara County, California*, 107 S. Ct. 1442, 1452 (1987). As the Supreme Court and our sister courts have worked their way through the difficult problems faced by employers in achieving this goal, the Supreme Court has emphasized the indispensable contributions of voluntary employer action in eliminating the vestiges of discrimination in the workplace. See *Weber v. Steelworkers*, 443 U.S. 193, 204 (1979).

Notwithstanding this clear expression of favor, the panel majority in this case has struck down the city of Washington's voluntary efforts to remove the vestiges of discrimination in the local Fire Department. It is hard to recall an instance where leading precedents of the Supreme Court have been given shorter shrift by this court. The panel majority complained that the Supreme Court in *Johnson* did not speak plainly enough as to what it meant by "manifest imbalance." We think the direction of the

Court in *Johnson* and elsewhere is manifestly clear and regret our inability to persuade our colleagues of this reading. As the appellate process in this case further unfolds, we trust that all the members of this court will come to share a common reading. The question presented in this case is too important to leave in its present unsatisfactory state in this circuit or elsewhere.